IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 5338 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DHANSUKH B SHAH - Applicant(s)
Versus
STATE OF GUJ & 1 - Respondent(s)

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Appearance :
MR AD SHAH for Applicant(s) : 1,
Mr I.M. Pandya, Addl.PUBLIC PROSECUTOR for Respondent(s) : 1,
MR Adil Mirza with Mr RR MARSHALL for Respondent(s) : 2,
MRS NR MARSHALL for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 07/03/2007

ORAL JUDGMENT

1. The petitioner, a Doctor, has approached this court under section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") for quashing

the process issued against him for the offence punishable under section 304A of Indian Penal Code, 1860, after admitting the complaint in Criminal Case No.4245 of 1994. The complaint was filed by the son of the deceased, broadly on the basis that his mother aged 50 died during the operation carried out by the petitioner and that the reason of death being negligence of the petitioner, he was required to be dealt with in accordance with law.

2. Relying upon the judgment of this court in ***Dr.(Mrs) Sudhaben vs. Vanrajbhai R Jaiswal & Anr.*** (1989 (2) GLH 320), it was submitted by learned counsel Mr A.D. Shah, appearing for the petitioner, that the process was ordered to be issued without proper application of mind in sofar as crucial and material evidence regarding negligence in the course of performance of the operation would consist of medical evidence of the expert, evidence of the persons who attended the operation or post mortem report and the medical case papers. While none of them were before the court, there was absence of sufficient grounds for issuing the process. He

submitted that even if the court were to find some substance in the allegations, it was required to hold an enquiry under the provisions of section 202 of the Code and after conducting such enquiry and recording such evidence as may be necessary, appropriate order could be passed and if, there is sufficient ground to proceed, the process could be issued. Learned counsel Mr Shah also pointed out that the complaint filed by the respondent herein before the Consumer Disputes Redressal Commission for compensation was rejected with costs on 26.2.1996 which clearly indicated that the complainant did not have sufficient evidence to substantiate the allegations of negligence.

3. Learned counsel Mr Adil Mirza appearing with Mr R.R. Marshall for the respondent, submitted that, as elaborately stated in the complaint, the petitioner had committed several irregularities and operated upon mother of the complainant without even obtaining consent of the near relatives and without having an intensive care unit to take care of the patient during an emergency. He submitted

that, as clearly alleged in the complaint, the petitioner had rushed into the surgical procedure without even waiting for completion of the course of medicine prescribed by the other doctor regularly treating the complainant's mother. Thus, there was sufficient material to straightaway proceed against the petitioner, according to the submission.

4. It clearly appears from the perusal of the complaint that the main evidence for the complainant to prove his allegations against the petitioner would be medical evidence in the form of medical papers, expert's opinion and the medical history of the deceased. The process appears to have been issued without such material being made available to the court, and, as held in the aforesaid judgment of this court, direct issuance of process without an enquiry under section 202 of the Code may be, under the circumstances, premature and unjustified.

5. Therefore. the petition is partly allowed with the direction that learned JMFC, Surat, in charge of the Criminal Case No.4245 of 1994 shall

hold an enquiry under the provisions of section 202 of the Criminal Procedure Code, and proceed thereafter in accordance with law. The impugned order dated 11.7.1994 issuing process for the offence punishable under section 304A at the initial stage is quashed. Rule is made absolute accordingly with no order as to costs.

sd/-
[D. H. Waghela, J.]

msp